

WC 06-90

Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of)
)
Georgia Public Service Commission)
Petition for Declaratory)
Ruling and Confirmation of Just)
and Reasonableness of Established)
Rates)

APR 18 2006

Federal Communications Commission
Office of the Secretary

**PETITION FOR DECLARATORY RULING AND CONFIRMATION OF JUST AND
REASONABLENESS OF ESTABLISHED RATES**

INTRODUCTION

The Georgia Public Service Commission ("GPSC"), by and through its counsel, the Attorney General for the State of Georgia, brings this petition to seek clarification that the GPSC is not preempted by the Federal Telecommunications Act of 1996 ("Federal Act") or the orders of the Federal Communications Commission ("Commission") from setting just and reasonable rates under 47 U.S.C. § 271 for local switching, high capacity loops and transport and line sharing. In the event that the Commission decides that the GPSC does not have jurisdiction to set Section 271 rates as described above, then the GPSC asks that the Commission declare that the rates that the GPSC set for high capacity loops and transport and line sharing are just and reasonable, and compel BellSouth Telecommunications, Inc. ("BellSouth") to abide by those rates.¹ If the Commission determines both that the GPSC is preempted and that the rates are not just and reasonable, the GPSC requests that the Commission set rates for BellSouth's high capacity loops and transport and line sharing for Georgia based on the certified record attached.

¹ The GPSC has certified a portion of the record, including pre-filed testimony of the parties, the transcript of the proceedings, the briefs filed by the parties and the pertinent orders of the GPSC in this matter.

On January 20, 2006, the GPSC issued an *Order Initiating Hearings to Set a Just and Reasonable Rate Under Section 271* (“*Order Initiating Hearings*”). (Tab G). In that order, the GPSC stated its intention to file this petition with the Commission seeking clarification that state commissions have the authority to set just and reasonable rates for de-listed unbundled network elements (“UNEs”). (Tab G, p. 4). On March 10, 2006, after receiving testimony, evidence and arguments of counsel, the GPSC issued its *Order Setting Rates Under Section 271* (“*Order Setting Rates*”). (Tab H). The *Order Setting Rates* does not seek to enforce the Section 271 obligations of BellSouth. It merely sets just and reasonable rates for local switching, high capacity loops and transport, and line sharing. On its own motion, the GPSC reconsidered its *Order Setting Rates*. In its March 24, 2006, *Order on Reconsideration*, the GPSC decided not to set a rate for local switching, but affirmed the rates it set for high capacity loops and transport and line sharing. (*Order on Reconsideration*, p. 2). (Tab I). However, the GPSC still seeks clarification of whether states are preempted from setting just and reasonable rates for local switching.

In its recent *Order of Dismissal*² in response to Momentum Telecom Inc.’s motion to withdraw its Complaint with prejudice, the Commission stated that its order should not be construed as either agreeing or disagreeing with Momentum Telecom, Inc.’s assertion that state commissions have concurrent jurisdiction over the just and reasonable rates for network elements under Section 271. The GPSC respectfully requests that the Commission resolve this question and conclude that state commissions are not preempted from setting just and reasonable rates under Section 271 for network elements.

² *In the Matter of Momentum Telecom, Inc. f/k/a Momentum Business Solutions, Inc. v. BellSouth Telecommunications, Inc.*, Order of Dismissal, File No. EB-05-MD-029 (Rel. March 3, 2006).

STATEMENT OF FACTS

In response to petitions for declaratory ruling filed by competitive local exchange carriers, the GPSC initiated Docket No. 19341-U³ on August 24, 2004 to examine BellSouth's obligations in light of the D.C. Circuit Court of Appeals vacatur in *United States Telecom Association v. Federal Communications Commission*, 359 F.3d 554 (2004). After the issuance by the Commission of the *Triennial Review Remand Order*,⁴ the GPSC issued a *Procedural and Scheduling Order* that adopted proposed dates for the testimony, hearings and briefs, and also directed the parties to submit a joint list of issues. On July 28, 2005, the GPSC approved the Joint Issues List submitted by BellSouth and Competitive Carriers of the South ("CompSouth")⁵ along with the issues added by Digital Agent, LLC. (*Order on Motion to Move Issues into Generic Proceeding*, p. 2). Issue 8(a) on the Joint Issues List stated as follows:

Does the Commission have the authority to require BellSouth to include in its interconnection agreements entered into pursuant to Section 252, network elements under either state law, or pursuant to Section 271 or any other federal law other than Section 251?

The GPSC relied upon federal statutory law, federal case law and relevant orders of the Commission to determine that it did have jurisdiction to set rates for network elements that were no longer required to be provided under Section 251 of the Federal Act.

³ *Generic Proceeding to Examine Issues Related to BellSouth's Obligations to Provide Unbundled Network Elements*

⁴ *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313 and CC Docket No. 01-338, Order on Remand, FCC 04-290 (released February 4, 2005) ("*TRRO*").

⁵ CompSouth is an association of Competitive Local Exchange Carriers.

On February 20-21, 2006, the GPSC held hearings for the purpose of setting just and reasonable rates for local switching, high capacity loops and transport and line sharing. In its March 2, 2006 *Order Setting Rates*, the GPSC set just and reasonable rates for local switching, high capacity loops and transport and line sharing. On reconsideration, the GPSC decided not to set a rate for local switching, but affirmed the rates set for high capacity loops and transport and line sharing.

ARGUMENT

1. THE COMMISSION SHOULD DECLARE THAT STATE COMMISSIONS ARE NOT PREEMPTED FROM SETTING JUST AND REASONABLE RATES FOR DE-LISTED NETWORK ELEMENTS UNDER SECTION 271 OF THE FEDERAL ACT.

A. There is a general presumption against preemption.

Every preemption analysis “start[s] with the assumption that the historic police powers of the states are not superseded by federal law unless preemption is the clear and manifest purpose of Congress.” Cliff v. Payco, 363 F.3d 1113, 1122 (11th Cir. 2004). That presumption also requires that any preemptive effect that is found to exist must be given a narrow application. Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996). The presumption against preemption is particularly appropriate where Congress has legislated in a field that has traditionally been regulated by the States, such as local telephone service. Payco, 363 F.3d at 1125.

Local telephone service has been traditionally regulated by the states. See, AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999). Georgia’s Telecommunications and Competition Development Act of 1995, O.C.G.A. § 46-5-160 et seq., obligates all local exchange companies to permit reasonable interconnection with other certified local exchange companies and specifically authorizes the GPSC to set rates, terms and conditions for interconnection services. O.C.G.A. § 46-5-164(a) and (b).

B. Federal law does not preempt a state commission from setting “just and reasonable rates” under Section 271 for de-listed unbundled network elements.

BellSouth’s argument that a state commission is preempted from setting just and reasonable rates under Section 271 necessarily mischaracterizes the state action at issue. Setting rates for de-listed UNEs under Section 271 is separate and distinct from taking enforcement action under Section 271. There is no question that the Commission is authorized to enforce the Section 271 obligations of a bell operating company (“BOC”), 47 U.S.C. § 271(d)(6). This enforcement authority includes the jurisdiction to take specific action upon a finding that a BOC has ceased to meet any of the conditions for approval to provide interLATA services. After notice and opportunity for hearing, the Commission may order the BOC to correct the deficiency, penalize the BOC or suspend or revoke the approval of its application. 47 U.S.C. § 271(d)(6)(A)(i)-(iii). The GPSC did not do any of these things.

In GPSC Docket No. 19341-U, the GPSC did not purport to find that BellSouth ceased to meet any of the conditions for approval to provide interLATA services. In fact, that question was not addressed in any of the GPSC’s orders. The scope of the orders related only to the just and reasonable rates for de-listed network elements. The GPSC did not address the issue of Section 271 compliance, nor did it take any of the actions included in Section 271(d)(6) that may apply when a BOC is found to have ceased meeting the conditions for approval. The setting of “just and reasonable rates” has nothing to do with the responsibilities that the Federal Act reserves for the Commission under Section 271(d)(6).

On July 1, 2004, BellSouth petitioned this Commission for a declaratory ruling to preempt an order of the Tennessee Regulatory Authority (“TRA”), claiming that the TRA

improperly enforces Section 271.⁶ BellSouth based this assertion on the claim that the TRA set a market rate under Section 271 for switching for customers with four or more lines in the Top 50 Metropolitan Statistical Areas.⁷ *Id.* However, as stated above, setting a just and reasonable rate for de-listed UNEs is not the same as enforcing the statute. Meshing the two concepts together confuses the issue. The Federal Act clearly states that the Commission enforces Section 271; its definition of what constitutes enforcement is equally clear, and enforcement does not include the setting of just and reasonable rates.

In *Cliff v. Payco General American Credits, Inc.*, the Eleventh Circuit

summarized the different types of preemption.

[T]he Supreme Court has identified three types of preemption: (1) express preemption; (2) field preemption; and (3) conflict preemption. “Express preemption” occurs when Congress has manifested its intent to preempt state law explicitly in the language of the statute. If Congress does not explicitly preempt state law, however, preemption still occurs when federal regulation in a legislative field is so pervasive that we can reasonably infer that Congress left no room for the states to supplement it – this is known as “field preemption” or “occupying the field.” And even if Congress has neither expressly preempted state law nor occupied the field, state law is preempted when it actually conflicts with federal law. “Conflict preemption,” as it is commonly known, arises in two circumstances: when it is impossible to comply with both federal and state law and when state law stands as an obstacle to achieving the objectives of the federal law.

⁶ BellSouth Telecommunications, Inc. Emergency Petition for Declaratory Rule and Preemption of State Action, WC Docket No. 04-245.

⁷ While BellSouth has petitioned the Commission on the authority of state commissions under Section 271, the GPSC’s Petition is distinct. First, the GPSC clarifies that it is not seeking a declaratory ruling that state commissions have Section 271 enforcement authority, only that state commissions may set just and reasonable rates under Section 271. Second, the GPSC has included portions of its administrative record in this proceeding to support the just and reasonable rates that it did set. In the event that the Commission determines that state commissions are preempted from setting just and reasonable rates for network elements under Section 271, the GPSC is requesting that the Commission set Section 271 just and reasonable rates or confirm that the rates set by the GPSC are just and reasonable. BellSouth’s petition does not address all of these issues. The FCC has not yet ruled upon BellSouth’s petition.

363 F.3d at 1122 (citations omitted). The fundamental question is the intent of Congress, as revealed in the language of the statute as well as the structure and purpose of the statute. *Id.* See also United Parcel Service, Inc. v. Flores-Galarza, 318 F.3d 323, 334 (1st Cir. 2003).

None of the three types of preemption applies to the setting of just and reasonable rates by a state commission under Section 271. The only federal court to have squarely addressed whether a state commission is preempted from setting just and reasonable rates under Section 271 has found that preemption does not exist. *Verizon New England Inc. d/b/a Verizon Maine v. Maine Public Utilities Commission*, 403 F.Supp 2d 96 (D. Maine 2005). The Court found no express preemption, because the Federal Act does not grant the Commission exclusive ratemaking authority for Section 271 UNEs. *Id.* at 102. In fact, the Court emphasized that Section 271 does not even expressly consider ratemaking or ratemaking authority. *Id.* Further, the Court noted that Verizon did not cite to any Commission order that interpreted Section 271 to provide an exclusive grant of authority for rate-making under Section 271. *Id.* The District Court reasoned that Section 271 only impliedly contemplates the making of rates, and concluded that “the authority of state commissions over rate-making and its applicable standards is not preempted by the express or implied content of Section 271.” *Id.*

Field preemption cannot be said to exist because there remains ample room for state commissions to regulate Section 271 just and reasonable unbundling rates. Although the Commission determines whether a BOC complies with the competitive checklist, a number of the checklist items recognize the established role of state commissions in ensuring that the goals of the Federal Act are met. Checklist items (i) and (ii) incorporate the pricing standards of Section 252(d)(1) with regard to interconnection and access to network elements. Under Section 252(d)(1), state commissions determine the just and reasonable rates for interconnection and

network elements. Item (iii) on the competitive checklist incorporates the just and reasonable rate requirements of Section 224 as it relates to nondiscriminatory access to poles, ducts and rights of way. Section 224(c) provides that it shall not be construed to provide the Commission with the authority to set the rates for these items where the matters are regulated by the state. Section 271 does not extend the area of federal regulation over the rates in question, nor does it diminish the ability of the states to set just and reasonable rates. It merely incorporates existing statutory requirements into the checklist for Section 271 compliance.

The areas of exclusive authority of the Commission are identified in Section 271, but they do not include the setting of just and reasonable rates for the elements under Section 271. That a state commission may set just and reasonable rates for de-listed network elements under Section 271 would not in any way inhibit or impair the Commission's ability or authority to approve applications by BOCs seeking to provide interLATA services, or to ensure that a BOC that has gained approval is complying with the Section 271 competitive checklist.

The third type of preemption, conflict preemption, does not apply to a state commission setting rates under Section 271. As stated above, conflict preemption "arises in two circumstances: when it is impossible to comply with both federal and state law and when state law stands as an obstacle to achieving the objectives of the federal law." Cliff v. Payco General American Credits, Inc., 363 F.3d 1113, 1122 (11th Cir. 2004). (citations omitted). There are no federal obligations that would be impossible to comply with in light of the rates ordered by the GPSC for local switching, high capacity loops and transport and line sharing. Further, the Court in *Verizon Maine* rejected the argument that conflict preemption existed in this setting. In fact, the Court rejected the argument that conflict preemption existed in the context of the Maine Public Utilities Commission setting cost-based rates for the Section 271 elements. *Verizon New*

England Inc. d/b/a Verizon Maine v. Maine Public Utilities Commission, 403 F.Supp 2d 96, 104-105 (D. Maine 2005). As discussed further below, the GPSC set rates substantially in excess of the rates that it found complied with the forward-looking cost model TELRIC.⁸

The question that the GPSC poses is therefore much easier to resolve than the one put before the court in *Maine Verizon*. The GPSC is not asking whether TELRIC compliant rates for Section 271 elements would conflict with the federal scheme. The GPSC asks only if it may set rates for de-listed unbundled network elements.

C. The framework of the Federal Act contemplates state commission involvement in a Bell Operating Company's Section 271 obligations.

The Commission must consult with state commissions prior to ruling upon a BOC's application to provide interLATA services. 47 U.S.C. § 271(d)(2)(B). However, this consultative role is not the full extent of a state commission's involvement with a BOC's Section 271 obligations. Bell operating companies satisfy the requirements for Section 271 approval through their Section 252 interconnection agreements by providing access and interconnection pursuant to at least one Section 252 interconnection agreement, or by offering access and interconnection pursuant to a Statement of Generally Available Terms ("SGAT"). 47 U.S.C. § 271(c)(2)(A)(i). State commissions approve or reject interconnection agreements pursuant to Section 252(e). SGATs also must be approved by state commissions pursuant to Section 252(f). Therefore, state commission approval is required whether a BOC meets its Section 271 obligations via interconnection agreements or pursuant to an SGAT.

⁸ While it is true that the *Verizon Maine* Court recognized in its analysis that the TELRIC compliant rates set by the Maine PUC were on an interim basis, the GPSC also committed to revisiting the rates that it set in GPSC Docket No. 19341-U a year from its order. (See, *Order Setting Rates*, p. 12) (Tab H).

The role that state commissions fulfill pursuant to the Federal Act bears upon a BOC's continued satisfaction of the conditions of Section 271. BOCs have an ongoing obligation under the Section 271 competitive checklist to provide interconnection and nondiscriminatory access to network elements in accordance with Section 251. 47 U.S.C. § 271 (c)(2)(B)(i). These components of the Section 271 checklist are satisfied through the processes set forth in Sections 251 and 252 for the negotiation, arbitration and approval of interconnection agreements. Competitive carriers may submit a request to an incumbent local exchange carrier ("ILEC") for interconnection, services or network elements. 47 U.S.C. § 252(a)(1). If the parties voluntarily agree to the terms for the interconnection agreement, the agreement still must be approved by state commissions. 47 U.S.C. § 252(e)(1). In the absence of agreement, any party to the negotiation may petition the state commission under Section 252(b)(1) to arbitrate any open issues. After the state commission issues an order resolving the disputed issues, the parties must submit for approval the interconnection agreement consistent with the state commission order. 47 U.S.C. § 252(e)(2). In deciding whether an agreement should be approved or rejected, the state commission is necessarily reaching a conclusion as to whether the BOC is meeting its Section 271 obligations.

Any argument that a state commission's Section 271 role is limited to the consultative function set forth in Section 271(d)(2)(B) ignores the manner in which Sections 251 and 252 are interrelated with Section 271. In *Qwest Corporation v. Minnesota Public Utilities Commission*, 2004 U.S. Dist. LEXIS 16963 (D. Minn. 2004), the District Court found that any agreement containing a checklist term must be filed as an interconnection agreement under the Act. As stated above, state commissions have authority to approve or reject these interconnection agreements. The fact that state commissions are approving agreements that must contain any

terms that relate to Section 271 compliance proves that the role of state commissions with regard to Section 271 extends beyond their consultative role in the context of an application for Section 271 approval.

2. IF THE COMMISSION FINDS THAT THE GPSC IS PREEMPTED FROM SETTING JUST AND REASONABLE RATES FOR SECTION 271 NETWORK ELEMENTS, THEN THE COMMISSION SHOULD FIND THAT THE RATES ORDERED BY THE GPSC FOR HIGH CAPACITY LOOPS AND TRANSPORT AND LINE SHARING ARE JUST AND REASONABLE, AND THAT BELL SOUTH IS OBLIGATED TO ABIDE BY THOSE RATES IN GEORGIA.

In its March 2, 2006 *Order Setting Rates*, the GPSC set rates for local switching, high capacity loops and transport and line sharing. On reconsideration, the GPSC decided not to set a rate for local switching, but affirmed the rates that it set for high capacity loops and transport and line sharing. The methodology employed by the GPSC for the determination of just and reasonable rates for high capacity loops and transport used BellSouth's cost estimates as a starting point for its analysis. (Tab H, p. 10). The just and reasonable rates were arrived at by increasing overhead loading to 20%. *Id.* Therefore, the rates ordered by the GPSC were well in excess of BellSouth's own estimates of its costs.

For line sharing, the GPSC adopted a loop rate of \$6.50. (Tab H, p. 12). This rate reflects the average of the highest rates contained in the agreements that the competitive carrier sponsoring the evidence has entered into with other ILECs. *Id.* The remaining recurring rates adopted by the GPSC for line sharing were based on voluntarily negotiated rates. *Id.* at 10. The GPSC adopted nonrecurring rates for line sharing that were based on the average of the non-zero UNE rates for line sharing in the seven states within the BellSouth region in which Covad does business. *Id.* at 12. By eliminating the zero rates involved in the UNE calculation, the approved rates were in excess of the previously approved TELRIC rates.

The GPSC has attached the portions of its record in Docket No. 19341-U that will enable the Commission to confirm that the rates ordered by the GPSC are just and reasonable. In the event that the Commission concludes that the GPSC is preempted from setting rates under Section 271 for de-listed network elements, the GPSC requests that the Commission affirm that the rates set by the GPSC for high capacity loops and transport and line sharing are just and reasonable and compel BellSouth to abide by those rates. If the Commission decides that state commissions are preempted from setting just and reasonable rates under Section 271 and that the rates ordered by the GPSC are not just and reasonable, the GPSC requests that the Commission set just and reasonable rates for BellSouth to charge in Georgia for high capacity loops and transport and line sharing based on the portions of the record in GPSC Docket No. 19341-U that are attached to this petition.

REQUEST FOR RELIEF

For the foregoing reasons, the Commission should declare that the GPSC is not preempted from setting just and reasonable rates for network elements under Section 271 of the Federal Act. However, should the Commission conclude that the GPSC is so preempted, the Commission should declare that the rates that the GPSC set for high capacity loops and transport and line sharing are just and reasonable, and should compel BellSouth to abide by those rates. Finally, if the Commission concludes both that the GPSC is preempted from setting just and reasonable rates under Section 271 and that the rates ordered by the GPSC are not just and reasonable, the Commission should set just and reasonable rates for BellSouth to charge in Georgia for high capacity loops and transport and line sharing based on the portions of the record in GPSC Docket No. 19341-U that are attached to this petition.

Respectfully submitted,

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BEFORE THE GEORGIA PUBLIC SERVICE COMMISSION

- - - - -
In the Matter of:

Generic Proceeding to Examine ISSUES :
RELATED TO BELLSOUTH'S OBLIGATIONS :
TO PROVIDE UNBUNDLED NETWORK : Docket No. 19341-U
ELEMENTS :
- - - - -

Hearing Room 110
244 Washington Street
Atlanta, Georgia

Monday, February 20, 2006

The above-entitled matter came on for hearing
pursuant to Notice at 2:00 p.m.

BEFORE:

STAN WISE, Chairman
ANGELA ELIZABETH SPEIR, Commissioner
H. DOUG EVERETT, Commissioner
ROBERT B. BAKER, JR., Commissioner

* * *

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APPEARANCES:

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On behalf of NuVox Communications, Inc., TalkAmerica
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I N D E X

<u>WITNESSES:</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
William Taylor				
By Ms. Mays	24	--	98	--
By Mr. Walsh	--	61	--	--
By Mr. Magness	--	73	--	--
By Mr. Watkins	--	95	--	--
Thomas Williams				
By Ms. Mays	102	--	--	--
By Mr. Watkins	--	112	--	--
William Weber				
By Mr. Watkins	129	--	--	--
By Ms. Mays	--	140	--	--
Pam Tipton				
By Mr. Magness	--	150	--	--
Joseph Gillan				
By Mr. Magness	172	--	--	--
By Mr. Walsh	--	178	--	--

<u>EXHIBIT</u>	<u>FOR IDENTIFICATION</u>	<u>IN EVIDENCE</u>
BellSouth:		
1 - Taylor Exhibit	54	99
2 - 2/13/06 Williams Exhibit	104	128
CompSouth:		
1, 2, 3 - Trade Secret documents	171	171
Covad:		
1, 2 - Trade Secret documents	122	128
3 - Trade Secret document	126	128
4 - Weber Exhibit	135	135
Staff:		
1 - 14361-U Staff Recommendation	191	195

P R O C E E D I N G S

CHAIRMAN WISE: Good afternoon, everyone. This will open Docket 19341-U.

And if I could take just a moment, Commissioners, before we get started, I wanted to note the passing of Commissioner Burgess' father this past Saturday and I'm sure that the Commission and everyone involved will offer their prayers and support to the family at this time.

We've got a couple of motions we need to rule on immediately and one is Bell's motion to take official notice of the commercial agreements and to take official -- I mean, just to take official notice of the commercial agreements. Let me note that Bell's motions have not been opposed and that the staff has recommended that the Commission grant the motion in the second motion to take official notice and that that will be the ruling of the Chair.

Bell has also asked to quash the subpoena for the hearing issued by the Commission on February 15th of this year. The subpoena had required Bell to produce a witness to testify about the information filed in a complaint case before the FCC and the underlying data to the rates in Bell's commercial agreements. Certainly the grounds for this motion are that the Commission does not have any subject matter jurisdiction -- jurisdiction over the network elements provided under 271 -- Section 271 and that no

1 jurisdiction to compel the appearance of a witness to
2 testify about such elements.

3 Staff once again has recommended to -- to the
4 Commission that we deny BellSouth's motion to quash. The
5 Commission already has concluded that it has the authority
6 to set just and reasonable rates for the delisted elements.

7 Subsequently, I will rule that this motion to quash is
8 denied.

9 Appearances today for the Commission.

10 MR. WALSH: Good morning, Mr. Chairman, Dan Walsh
11 on behalf of the Commission staff.

12 CHAIRMAN WISE: CUC.

13 MS. MELLINGER: Jeanette Mellinger on behalf of
14 CUC.

15 CHAIRMAN WISE: Thank you. BellSouth.

16 MS. FOSHEE: Lisa Foshee and Meredith Mays on
17 behalf of BellSouth.

18 CHAIRMAN WISE: Al-Cal.

19 (No response.)

20 CHAIRMAN WISE: No response.

21 AT&T.

22 MS. OCKLEBERRY: Suzie Ockleberry on behalf of
23 AT&T.

24 CHAIRMAN WISE: BroadRiver.

25 (No response.)

1 CHAIRMAN WISE: Cbeyond.

2 (No response.)

3 CHAIRMAN WISE: Competitive Carriers of the South.

4 MR. JONES: Chairman, Clay Jones on behalf of
5 CompSouth and with me today is Mr. Bill Magness, who will be
6 serving as lead counsel.

7 CHAIRMAN WISE: Covad.

8 MR. WATKINS: Mr. Chairman, Gene Watkins on behalf
9 of Covad.

10 CHAIRMAN WISE: Digital.

11 (No response.)

12 CHAIRMAN WISE: EZ Communications.

13 (No response.)

14 CHAIRMAN WISE: FDN.

15 (No response.)

16 CHAIRMAN WISE: ITC^DeltaCom.

17 MR. JONES: Clay Jones on behalf of ITC^DeltaCom.

18 CHAIRMAN WISE: KMC.

19 (No response.)

20 CHAIRMAN WISE: MCIMetro.

21 (No response.)

22 CHAIRMAN WISE: NuVox.

23 MS. LEWIS: Mr. Chairman, Anne Lewis and Susan
24 Berlin on behalf of NuVox. I'm also --

25 CHAIRMAN WISE: Who else, Ms. Lewis?

1 MS. LEWIS: I'm sorry, Susan Berlin from NuVox.

2 CHAIRMAN WISE: Thank you.

3 MS. LEWIS: And I'm also entering an appearance on
4 behalf of TalkAmerica and Xspedius. I believe KMC is
5 probably going to withdraw from this docket.

6 CHAIRMAN WISE: Who?

7 MS. LEWIS: KMC.

8 CHAIRMAN WISE: Thank you.

9 MS. LEWIS: Those carriers TalkAmerica, Xspedius,
10 and NuVox will be participating through CompSouth, Mr.
11 Magness.

12 CHAIRMAN WISE: Okay, I'll may call you a couple
13 of times until I get it right.

14 MS. LEWIS: Okay.

15 MR. JONES: Chairman, if I might, the same comment
16 for ITC^DeltaCom, is who participating through CompSouth, we
17 won't have separate witnesses.

18 CHAIRMAN WISE: All right, thank you. US LEC.

19 (No response.)

20 CHAIRMAN WISE: I skipped Sprint.

21 (No response.)

22 CHAIRMAN WISE: USCarrier.

23 (No response.)

24 CHAIRMAN WISE: WilTel.

25 (No response.)

1 CHAIRMAN WISE: XO and Allegiance.

2 (No response.)

3 CHAIRMAN WISE: Ms. Lewis, you previously
4 responded on Xspedius?

5 MS. LEWIS: Yes, sir.

6 CHAIRMAN WISE: Thank you. And Sail.

7 (No response.)

8 CHAIRMAN WISE: No response there as well. Thank
9 you, Doug.

10 (No response.)

11 CHAIRMAN WISE: Ms. Foshee, if you'd like please
12 call your first panel.

13 MS. FOSHEE: Thank you. We call Dr. Bill Taylor.

14 MR. WATKINS: Mr. Chairman, we have a few
15 preliminary matters that we want to present to the Chair, if
16 that's all right, witness order as well as some pending
17 motions that are relevant to this proceeding.

18 CHAIRMAN WISE: I hate to be surprised, Mr.
19 Watkins, but go ahead.

20 MR. WATKINS: Mr. Chairman, the Competitive
21 Carriers of the South and Covad Communications in
22 conjunction with each other have -- would like to propose
23 that Mr. Weber go before Mr. Gillan. And to the extent that
24 a separate issue is addressed with the 30(b)(6) witness fall
25 in the particular order --

1 CHAIRMAN WISE: If you would Mr. Watkins, please
2 speak up.

3 MR. WATKINS: I apologize, Mr. Chairman, let me
4 just get to the diaz here.

5 CHAIRMAN WISE: That might help.

6 MR. WATKINS: We're proposing that the order go
7 William Taylor, Thomas Williams, William Weber, the 30(b)(6)
8 witness and then Joseph Gillan. Do you have any objection
9 to that?

10 MS. FOSHEE: No objection.

11 CHAIRMAN WISE: I was waiting though.

12 MR. WATKINS: I saw the look there.

13 The other issue that we have pending before the
14 Commission involves a motion to hold BellSouth in contempt
15 by the Competitive Carriers of the South.

16 CHAIRMAN WISE: Mr. Watkins, do I have that motion
17 or is that --

18 MR. WATKINS: The motion and BellSouth's response
19 have been on file. Let me see when that response was filed.
20 BellSouth filed its response on February 10, Mr. Chairman.

21 CHAIRMAN WISE: Will you give me your basis
22 please.

23 MR. WATKINS: The -- if the Commission will
24 remember, we had some discovery issued to BellSouth
25 regarding line sharing and cost analyses related to that.

1 We had requested all cost analyses for non-UNE cost case
2 analyses of the cost of line sharing. BellSouth produced
3 nothing in connection with the order to compel.

4 So the Competitive Carriers of the South -- and
5 this is with regard to Data Request number 8, moved to hold
6 BellSouth in contempt. On February 10, the Friday that the
7 direct testimony was due before the Commission, BellSouth
8 produced responsive documents to Data Request number 8,
9 which was a cost analysis related to line sharing.

10 The motion to hold BellSouth in contempt alleges
11 that that cost analysis was created after the motion to
12 compel was granted. So the staff limited the -- we had
13 asked for all cost studies. The Commission staff said they
14 only had to produce the most recent cost study. The problem
15 is the most recent cost study at that time is not the cost
16 study that they produced. They created a new one in order
17 to produce it. And if there's any doubt about that, in
18 BellSouth's response filed that February, the following
19 representation is made by BellSouth counsel. "The most
20 recent analysis BellSouth has done is the one approved by
21 upper management late Thursday afternoon." The motion to
22 compel was granted on Tuesday, presented -- they're
23 referencing a cost study presented to their upper management
24 on Thursday two days later. "As counsel for BellSouth
25 explained to Mr. Watkins on Thursday, February 9," again two

1 days after the motion to compel was made, was signed by the
2 Commission, "once the analysis was finalized, BellSouth
3 would produce it."

4 So on Thursday, two days after our motion to
5 compel was granted they still haven't finalized the cost
6 analysis they finally gave us on Friday.

7 Now, the reason we have moved to hold BellSouth in
8 contempt is it's facially contemptuous for us to ask for a
9 cost study, for the Commission to compel it, and for
10 BellSouth rather than to give us the one that they have,
11 make a new one in that interceding period and then give it
12 to us. Which they readily admit, they hadn't finalized on
13 Thursday, the one they gave us on Friday after the motion to
14 compel on Tuesday.

15 What we would ask -- now, we asked for two things
16 in our motion to compel, we asked that the testimony of
17 Tommy Williams be struck or the Commission put this off in
18 order for us to get a new analysis and then be able to move
19 forward on a line sharing rate case at that point. We're
20 okay with neither one of those happening. What we would
21 appreciate though is that BellSouth be ordered to provide us
22 with the cost analysis they had before the one they produced
23 so that we can take a look. There's electronic bases within
24 the one they did produce to believe that some of the numbers
25 were changed, probably for this case.